August 28, 2000

Honorable Carol Browner
Administrator
U.S. Environmental Protection Agency
401 M Street, NW
Washington, D.C. 20460

Anne Goode, Director
Office of Civil Rights (1201A)
US Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

Re: **Comments on *Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits* and *Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs***

Dear Administrator Browner and Ms. Goode:

These comments are submitted by Golden Gate University School of Law's Environmental Law and Justice Clinic ("ELJC"). Since its inception in 1994, the ELJC has provided free legal services and education on environmental health and justice issues to San Francisco Bay Area residents, community groups and public-interest organizations. The Clinic assists communities bearing disproportionate environmental burdens, particularly communities of color and low-income neighborhoods. ELJC addresses a range of environmental issues by offering a combination of services: legal counseling and representation; community education workshops and community guidebooks; and policy and legislative analysis.

Our clients are assaulted by hazardous chemicals on a daily basis and disproportionately bear the burden of facilities that create, emit, and dispose of these hazardous substances. Such ongoing exposures to multiple toxins from a variety of sources places our clients at greater risk for developing serious health problems than the general population. Many of our clients bear the direct burdens of environmental harms from facilities that provide citywide or regional benefits. For example, our clients in the Bayview Hunters Point neighborhood in San Francisco, a community which is close to ninety percent persons of color live amidst several hundred polluting or potentially polluting sources, far more than any other neighborhood in San Francisco. Many of these facilities, such as the City's sewage treatment plant, a large power plant, and others, benefit residents throughout San Francisco. Surveys have shown that in Bayview Hunters Point, rates of cervical and breast cancer are double that of San Francisco and the Bay Area, and that hospitalization rates for asthma, cognitive heart failure, hypertension, diabetes, and emphysema are three times the statewide average.

The ELJC represents several clients that have filed Title VI complaints with EPA, or alleged Title VI violations in judicial actions. For instance in 1997, the Chester Street Block Club

Association ("CSBCA") filed a complaint after Cal-EPA's Department of Toxic Substances Control (DTSC) approved inadequate remediation plans relating to the reconstruction of the Cypress Freeway in Oakland, California.[1] For several decades, residents living at the Cypress site have been burdened with the improper treatment and disposal of hazardous substances released from multiple sources. DTSC failed to properly identify these sources and the extent of contamination and allowed the freeway and an adjacent neighborhood park to be constructed without proper investigation and long-term remediation. DTSC's disregard of the community residents' concerns, and denial of a meaningful process for public participation, resulted in hazardous contaminants being left in place under the freeway, and inadequate protection from ongoing risks of exposure to hazardous contaminants. After being accepted for investigation by the Office of Civil Rights in September, 1997, the CSBCA's complaint has languished at EPA for the past three years.

The ELJC also represents Midway Village Advisory Committee, a group of low-income residents living in a public housing complex in Daly City, California that was constructed over a toxic waste site. DTSC has allowed Midway Village residents to be continuously exposed to hazardous chemicals by failing to properly remediate the toxics at the Midway Village site and by recently approving inadequate cleanup plans for an adjacent park area.

Our clients have looked to Title VI of the Civil Rights Act of 1964 in an attempt to redress harms from the disproportionate environmental burdens they suffer. Unfortunately, existing environmental laws have failed to adequately deal with these environmental inequities. With few exceptions, environmental regulation focuses on improving overall ambient environmental conditions, and does not consider the distributional consequences of where pollution is occurring. Virtually all environmental permitting decisions evaluate only the incremental impacts of a proposed facility's activities, and not the effects of cumulative or multiple exposures from other sources. Moreover, most environmental regulation places controls on, rather than eliminates, pollution. So called "grandfather" clauses included in many environmental laws – clauses that exempt or create more lenient standards for existing facilities – exacerbate inequities by encouraging older, dirtier facilities in low-income communities or communities of color to continue operating. Moreover, often the laws governing the siting of a facility are procedural in nature, and offer no remedy to siting decisions that reflect the relative political power of white and wealthier communities, and their desire not to host environmentally undesirable facilities.

By holding agencies accountable for their mandate to protect people and the environment without discriminating against people of color—particularly those who bear our society's disproportionate industrial burdens—Title VI holds great promise for our clients to obtain relief where other laws and regulations have failed them.

Unfortunately, however, the current *Draft Revised Investigation Guidance* documents fail to properly implement Title VI and will not safeguard the very groups that it was intended to protect. According to the Guidance, in order to find a recipient agency in violation of this Title VI, EPA's Office of Civil Rights ("OCR") would have to determine that the recipient's programs or activities resulted in an "unjustified adverse disparate impact," meaning that "the impact is

[1] EPA File No. 8R-97-R9.

both adverse and borne disproportionately by group of persons based on race, color, or national origin," and that it is unjustified. Section II. Even if adverse disparate impacts are found, the Guidance documents include an opportunity for the recipient agency to justify its actions. Yet Title VI makes no allowance for such a justification. There is simply no room for this type of "balancing" in civil rights laws, which are intended to protect against racial discrimination. Moreover, the Guidance inappropriately relies on compliance with existing environmental standards to show the absence of adverse impacts and discriminatory effects (such as where an air permit will not cause an area to violate the relevant National Ambient Air Quality Standard) despite the demonstrated *failure* of such laws to prevent disproportionate environmental harms from occurring in the first place.

The Guidance leaves unanswered many additional concerns about implementation. While the *Draft Revised Investigation Guidance* explains the various steps of an investigation in more detail than the *Interim Guidance,* and includes definitions in a Glossary of Terms, it is still unclear how the Guidance will be utilized in practice to achieve just results for impacted communities. Many policy decisions in the Guidance appear to help the recipient while hurting the complainant in administrative proceedings.

Our specific comments below focus on various elements of the *Draft Revised Investigation Guidance* ("Guidance").

Public Participation

One of the most serious defects in the Guidance is that it provides very limited opportunity for public participation in the administrative process, while providing multiple opportunities and procedural rights for recipient agencies. See, e.g., Sections II.B.1, 2 . For example, while recipients are given an opportunity for a hearing with an EPA ALJ regarding a formal finding of noncompliance, complainants have no opportunity within the administrative process to challenge EPA's findings. Sections II.A.7, II B.2. Moreover, the Guidance limits the role of complainants by allowing it to be determined by the nature of the circumstances and of the claims. Aside from submission of information relevant to the complaint, the complainant's role is limited at best, to non-existent, throughout the process

Even accepting for the moment EPA's characterization of the complaint process as not adversarial between the complainant and recipient – one, we submit, that elevates form over substance-- there nonetheless is considerable room for EPA to fashion procedures that allow the complaints to participate in the administrative and decision-making process. For example, where OCR seeks an informal resolution directly with the recipient, the complainant may have no opportunity to participate in the decision-making process. In fact, the complainant's consent to the resolution is not even required. Section IV.B. To safeguard their rights, complainants should be kept informed throughout the proceedings and given an opportunity to comment on proposed informal resolutions. (See also comments below).

Moreover, since the Guidance authorizes EPA to give significant weight to analyses submitted by recipients when EPA conducts its adverse impact determination, complainants should have access to evidence submitted by recipients and the opportunity to rebut it. Likewise, since the

recipient has 50 days to respond to a preliminary finding of noncompliance by EPA —including an opportunity to demonstrate that OCR's findings are incorrect or that compliance may be achieved some other way—the complainant should be given a comparable opportunity, such as a period of 50 days, to respond to a preliminary finding that a recipient agency has not violated Title VI.

Finally, OCR should be required to regularly report to the complainant on the status of pending complaints, at a minimum at least once every six months. This would help ameliorate some of the frustration that has been engendered by EPA's lengthy delays in processing administrative complaints.

Complainants' role should not be determined or limited by the nature of their claims. Instead, the opportunity for public participation should be guaranteed at every possible stage of the administrative process.

Informal Resolution

While OCR will encourage informal resolution of administrative complaints wherever practicable—meaning settlement of a complaint prior to a formal finding of non-compliance—the complainant's rights are not adequately protected. As noted, the Guidance provides the affected community no role or opportunity for input where OCR seeks to informally resolve the complaint directly with the recipient. In those cases, the complainant's consent to the resolution is not required if OCR determines that there are "sufficient assurances" regarding implementation of a plan to "eliminate or reduce, to the extent required by Title VI, adverse disparate impacts." Section IV.B. This means that once a complaint is filed, complainants are completely shut out of the resolution process and will be reliant on the permit applicant and recipient to safeguard their interests and ensure adequate protection against adverse health impacts.

The Guidance allows EPA to determine—with the recipient but without the complainant—what mitigation measures are appropriate to settle the complaint. However, *an independent investigation by EPA to determine the necessary relief or action is not even required* before reaching a resolution. Section IV.A.2. It is virtually impossible for EPA to make a determination about the measures necessary to eliminate or reduce adverse disparate impacts without an investigation of the specific allegations. It is unclear how, absent an investigation into the facts of the complaint, EPA intends to determine the significance of the potential effects and risks of a given permitting action. This is particularly true where there are claims that a permit would adversely affect cumulative risks or impacts.

Complainants must be able to provide input regarding any informal resolution reached between OCR and the recipient. Complainants should have access to a tentative resolution and be given opportunity to comment. Complainants' consent should be required for all informal resolutions. While the current Guidance does not require the complainants' consent to such an agreement, even the *Interim Guidance* encouraged the recipient to negotiate a settlement directly with the complainant.

Finally, the Guidance must include stronger provisions to ensure that "informal resolutions" are properly implemented, monitored and enforced. While Section IV.B. covers these issues, OCR should be required to ensure that mitigation measures have been implemented and have been successful. In addition, there should be a limit on the length of time EPA may devote to trying to informally resolve a complaint before it begins an investigation. Experience shows that the word "prompt" does not mean to EPA what it means to complainants.

No Stay Provision

The Guidance presumes that the disputed permit will be issued—indeed there is no stay provision at all. This puts complainant groups at risk from ongoing project impacts and greatly undermines their ability to effectively negotiate with recipient agencies. Complainants must bear the burdens stemming from implementation of permits while their complaints are pending, and indeed languishing for years, at EPA (often while simultaneously fighting to ensure that the permits are complied with).

Thus, for example, in the Chester Street case, three years after the complaint was filed, complainants have had no redress for the impacts of the permits granted by DTSC. They have had to suffer through an almost continuous stream of projects impacting their neighborhood, including the construction of the Cypress Freeway on a highly toxic site without proper cleanup, the remediation of the highly toxic buffer zone between the neighborhood and the Cypress Freeway (the proposed South Prescott Park) which was mitigation for building the freeway on a contaminated site, and various other construction, remediation and cleanup projects. The complainants continue to suffer through the impacts of permitted projects while their complaint languishes at EPA. The complainants are left with no bargaining power in dealing with the permitting agencies they are complaining about in the first place.

Alternative Dispute Resolution

The Guidance evinces a strong preference for resolving complaints through Alternative Dispute Resolution (ADR). Section IV.A.1. This is problematic in theory and practice.

First, structurally ADR favors educated negotiators with resources and experience—basically industry and agencies. ADR does not take into account the inherent unequal bargaining power between parties. Community residents will certainly lose out in negotiations with high priced corporate lawyers with years of training in negotiating strategies.

Second, in practice the use of ADR, in combination with EPA's lengthy delays in resolving complaints and the lack of any stay provisions, may exacerbate community tensions, rather than calm them. For example, in the Chester Street case, two years after the community filed its complaint, EPA approached the neighborhood residents with an attempt at mediation. At the time, the State was forcing the cleanup of the contaminated South Prescott Park site with very little, if any, protection for neighborhood residents during cleanup. Residents had to endure meetings where the recipient agency, DTSC, as well as the California Department of Transportation (Caltrans), which was implementing the cleanup plan, completely dismissed the neighborhood's concerns, treated residents with open contempt, and told residents that either

they would have to submit to the park cleanup now, or there would be no park. The neighborhood residents were meeting one night with Caltrans and DTSC in a very adversarial environment and then expected to spend another night trying to "mediate" with the very agencies who previously were insulting them and completely disregarding their concerns.

In this situation, where the agencies refused to deal with residents and dismissed their concerns, sitting down with the opposing side to attempt to mediate was a losing proposition and in fact angered and insulted the community even further.

While EPA's intent in utilizing ADR may be valid, as a practical matter, our experience shows it doesn't work with great success in these situations. The use of ADR is inappropriate in many Title VI complaint scenarios. EPA should reconsider the reliance the Guidance places on ADR.

Area Specific Agreements

The Guidance promotes the laudable goal of encouraging recipients to reduce adverse disparate impacts where they have been identified through an approach referred to as an area-specific agreement (ASA). Section V.B.2. The ASA would, in theory, function as a collaborative effort where a recipient would work together with stakeholders and affected communities to create a plan that would reduce or eliminate any disparate impact. However, the old saying "the devil is in the details" surely applies to this proposal. Despite its positive goal, the proposed plan for ASAs contains fatal flaws that would allow adverse disparate impacts to continue where they exist, and effectively cuts off not only remedies, but also infringes the rights of potential complainants by foreclosing future complaints by affected communities. Some immediately apparent flaws in this proposal include:

- *No mechanism for monitoring and enforcing an ASA*
  The Guidance is silent on who or what agency would be responsible for monitoring adherence to an ASA and what, if any, powers communities would have in enforcing them.
- *No recourse or redress for violations of an ASA by recipients or facilities*
  The Guidance is also silent on what penalties or remedies would be available to communities who are victims of ASA violations. Presumably, the EPA would accept complaints in such instances, however language in the Guidance contradicts this. The Guidance states that "later-filed complaints rais[ing] allegations regarding other permitting actions … covered by the same area-specific agreement" would be dismissed based upon an "earlier finding." Section V.B.2. Under no circumstances should the EPA fail to investigate a complaint merely because an ASA is in place. If anything, the EPA should be prompted by complaints to revisit and reexamine ASAs to make sure they are working. The burden should not be on past complainants to monitor and enforce ASAs.
- *No mandatory provision to revisit and revamp an ASA when standards change*
  Many standards relating to emission levels and health vary over time with new data and discoveries. Standards that may have been acceptable at the time an ASA was formed could subsequently change as more stringent laws or regulations are adopted, rendering the ASA insufficient in protecting health. The Guidance makes no provision for this likely scenario.

- *Formation of ASA*

Noticeably absent from the Guidance is any discussion about important details involved in the formation of an ASA. Obviously each ASA would be specific and tailored to a particular set of facts and circumstances. The cast of facility operators, recipients and affected communities would be different for each case. However, what would be consistent and predictable in nearly every instance is the bargaining power of the parties involved. Affected communities generally have little, if any, bargaining power in dealing with recipients and facility operators. Without any power, such as the ability to stay or deny a permit, or influence the size and scope of a project, affected communities will have little, if any, ability to frame the outcome of an ASA.

The Guidance seems to assume a situation where adverse or potentially adverse parties of relatively equal bargaining strength come together and at arms length form an agreement that roughly results in a compromise where each side has made approximately exact concessions for approximately exact gains. Reality, however, does not reflect this. Recipients are generally government agencies with substantial budgets and resources. They would come to the bargaining table armed with reports conducted by scientists they employ or have hired. They have legal counsel at their disposal to buttress and justify whatever decision and outcome they wish. Facility operators would be similarly situated, and further, are motivated by business need and potential profit to get as much as they can out of the ASA. What strength do affected communities have against this array of power, where the permit has already been granted and construction begun on the project?

Another absent element is what constitutes adequate representation of an affected community. The Guidance gives no assurances that all who may be affected by the ASA would have a voice in its formation. In other words, a recipient could create an ASA with a particular community that would be binding on that community. Future complaints from community members or area residents would be dismissed or rejected. Yet the Guidance makes no provision for complainants who are community members or area residents whose input was not solicited for the agreement, or whose needs were not met by the agreement. Under the Guidance, those persons' complaints would be dismissed or rejected.

Given this circumscribed arena in which these ASAs would likely be formed, the Guidance's silence on the crucial issue of formation is deeply troubling. If the EPA has not considered this aspect carefully, it certainly should. If it has considered it but chose to ignore it, EPA should reconsider its position to ensure that complainants' interests are protected.

Adverse Disparate Impact Analysis

EPA may not delegate its Title VI enforcement responsibility to its recipients. But the Guidance gives significant weight to the recipient's assessment regarding the existence of adverse disparate impacts. OCR should not delegate this important task to the recipient; instead of reviewing and possibly relying on the recipient's analysis, OCR should conduct its own independent analysis. The Guidance provides that EPA's review will evaluate whether the methodology used is appropriate and valid, and assess the "overall reasonableness of the outcome or conclusions." Section V.B.1. If EPA's review reveals "significant deficiencies,"

OCR would not likely rely upon the analysis, but it is unclear how OCR would proceed and whether the complaint would then be dismissed or pursued.

Due to the considerable weight the Guidance and OCR place on the recipient's assessment—looking for "overall reasonableness" or "significant deficiencies"— complainants should have access to all documents submitted by recipients, and be provided an opportunity to provide comment on them. In addition, if there are *any* noticeable deficiencies in the recipient's analysis, OCR should not rely on the analysis. Further, as already stated, OCR should conduct its own analysis.

OCR may, but is not required to, consider other relevant or nearby "sources of similar stressors" for inclusion in its analysis. Section VI.B.2.b. This determination is likely dependent on allegations in the complaint. If a complaint refers generally to "cumulative impacts" or "overburdened" communities, EPA will determine, based on the specific permit at issue, which stressors are of concern. It is unclear whether this would necessarily include consideration of exposures to all sources within the recipient's jurisdiction, or only stressors related to the specific allegations at issue. While a complainant may allege cumulative impacts or a pattern of discrimination, those who lack technical and scientific expertise may be unable to make such allegations with specificity, and will instead be forced to rely on EPA's assessment, and/or be unable to challenge or rebut the recipient's analysis.

Finally, OCR should not dismiss a complaint as the result of a recipient's showing of a significant decrease in overall emissions or of pollutants named in the complaint, as stated in Section VI.B.1.a., unless OCR conducts an assessment establishing the reductions will not result in continued adverse disparate impact on the affected community. Reduced emissions can still result in continued discrimination, and complainants will be left with no administrative remedies.

Conducting the Impact Assessment

In conducting the impact assessment, EPA expects to use data "to attempt to quantify potential impacts," despite the fact that quantitative data is not always available, relevant, sufficient or conclusive. Section VI.B.3. EPA acknowledges that direct, causal links to impacts are rarely available, and that it will be forced to rely on predictions or "potentially significant exposures and risks." Section VI.B.3. Uncertainties are to be discussed and weighed. However, given the inability of current risk assessment methods to deal with populations already burdened by significant environmental and health impacts—and the inherent uncertainties and data insufficiencies involved—reliance on these methods to determine potential impacts and cumulative impacts is particularly troubling.

Specifically, given the numerous uncertainties regarding risk assessment, the hierarchy of data types listed in Section VI.B.3. should not be viewed as comprehensive. Often it is difficult to quantify effects of various exposures. There should be some measure of value given to qualitative factors that are not quantifiable, such as proximity to the source. Regarding the list of hierarchy of data types, "Known releases of pollutants or stressors in the environment" should be

moved to the top, and "The existence of sources or activities associated with potential exposures to stressors" should be moved further up the list.

Finally, the Guidance defines "impact" too narrowly; social, cultural and economic impacts also should be considered as adverse project impacts. Title VI does not only prohibit discrimination regarding health impacts. Communities adjacent to industrial facilities are also affected by disruptions to their every day lives, their cultural traditions and social resources. They are harmed by reduced property values and changes in the character of their community. They must live with the threat of accidental releases or spills, as well as the stress and anxiety about harm to their families from exposure to pollutants. They must regularly deal with the noise, industrial traffic, unsightliness and other disruptions that shake the fabric of their neighborhoods.

Making the Adverse Impact Decision

First, see discussion above regarding "Adverse Disparate Impact Analysis."

Despite OCR's intent to use "all relevant information," it is still unclear how OCR will determine whether the estimated risk or measure of impact is "significantly adverse," when significant is defined as "sufficiently large and meaningful to warrant some action" (Glossary of Terms). OCR will compare this estimated risk or measure of impact with "benchmarks for significance" provided by environmental law, EPA policy or regulation. Section VI.B.4. But while this evaluation would consider policies developed for single sources, it does not include consideration of either cumulative exposures or uncertainties in estimates of risks. It will be particularly challenging to assess cumulative non-cancer health effects, where such "benchmarks" may not exist. In those cases, it will be extremely difficult for complainants to meet this criterion in order to proceed further.

There is no method provided in the Guidance to deal with the inherent uncertainty at this stage—especially regarding cumulative risks or synergistic effects of the multitude of stressors to which affected communities are exposed. When determining whether potential or actual impacts are "significantly adverse" and there is evidence of potential or likely adversity, uncertainties should be resolved in favor of complainants as human health is at stake.

Further, most "benchmarks" for health standards are set for an average-sized, adult, white male. Reliance on these benchmarks to determine whether impacts are "adverse" to predominantly minority communities is inappropriate. These figures do not account for sensitive receptors, such as children or women of childbearing age, persons with reduced lung capacity who are especially sensitive to asthma or other respiratory illnesses, the elderly, or communities that are already burdened by existing environmental and health harms.

Use of National Ambient Air Quality Standards

Section VI.B.4.b of the Guidance addresses the use of the National Ambient Air Quality Standards ("NAAQS") in assessing whether the EPA will find adverse health impacts in its investigation of a Title VI complaint. In any complaint that alleges adverse health impacts relating to air quality, there is a presumption that if the area in question meets NAAQS for a

pollutant at issue, "the air quality in the surrounding community will generally be considered presumptively protective and … not viewed as 'adverse' within the meaning of Title VI." Section VI.B.4.b. This presumption is unwise and unwarranted.

NAAQS in theory are health-based standards, but in fact adverse impacts can and do occur at levels below NAAQS. Lead is an excellent example. While the current NAAQS for lead is 1.5 mg/m^3, the consensus in the medical community is that there is no safe level of exposure to lead. EPA itself has adopted this position.[2] Moreover, since the NAAQS for lead is a maximum quarterly average, compliance with it may not adequately protect maximally exposed individuals from lead's adverse health impacts. This is particularly true since some of lead's adverse endpoints, such as reproductive toxicity, can result from very short term exposures. Equally fundamental, NAAQS change in response to new scientific information. EPA's recent tightening of the NAAQS for ozone and particulate matter illustrates this point; evolving scientific information demonstrates that tens of thousands of persons are significantly affected by particulate emissions at levels previously believed safe. *See also* David Fairley *Daily Mortality and Air Pollution in Santa Clara County, California: 1989-1996*. ENVIRONMENTAL HEALTH PERSPECTIVES, Vol. 107, No. 8, August 1999. (finding a statistically significant correlation between mortality in the San Francisco Bay Area and particulate matter emissions (PM_{10} and $PM_{2.5.}$) and concluding that "current national air quality standards … may not be protective of public health for the Bay Area.")

As an example of why the presumption proposed in the Guidance is ill-advised, consider the experience of the predominantly minority community in the Bayview Hunters Point section of San Francisco. In 1994, an energy company proposed constructing a new power plant in the community that was authorized to emit over 49 tons per year of PM_{10} emissions (the community was already host to two existing power plants). The Bay Area at the time was in compliance with the NAAQS for particulate emissions, and the project was not projected to cause a violation of this NAAQS. Nonetheless, the PM_{10} emissions would have increased exposures in the community surrounding the new plant, which was already suffering higher levels of asthma, respiratory ailments, and other health problems than other Bay Area communities. Moreover, in 1996, despite the existing NAAQS for particulates, an estimated 1,270 annual deaths in the San Francisco-Oakland are were attributable to PM_{10} emissions.[3] Clearly, an additional 50 tons per year of particulate emissions would have had seriously harmful health impacts both locally and regionally, yet the Guidance would presume that the emissions were not adverse.

The Guidance's presumption, moreover, ignores the fact that in real life, facilities regularly violate their permit limits. EPA estimated that in fiscal year 1998, the rates of *significant* noncompliance for major facilities (by definition those subject to the most regulatory attention) were 20 percent under the Clean Water Act, 21 to 28 percent under RCRA and at least 7 percent (and probably higher) under the Clean Air Act. [4] EPA also noted evidence suggesting

[2] *See, e.g,* 40 C.F.R. @ 141.51(b) (1998) (setting maximum contaminant level goal for lead of zero).
[3] *See* Philip Hilts, *Fine Pollutants In Air Cause Many Deaths*, NY TIMES, May 9, 1996 at A8.
[4] Sylvia Lowrance, *Innovations in EPA's Compliance and Enforcement Program*, Presentation to U.S. E.I Office of Enforcement and Compliance Assurance (Feb. 3, 1999).

widespread violations of its New Source Review requirements under the Clean Air Act.[5] Likewise, a 1999 study shows that more than 39 percent of all major facilities in five large industrial sectors violated the CAA in the two year period starting in January, 1997, and on average were out of compliance half the time during this period.[6] Again, the consequences of these violations are experienced most directly by adjacent community residents.

In theory, the Guidance permits the presumption of "no adverse impact" to be rebutted, but in practice this will rarely if ever occur. It seems unlikely, for example, that EPA staff will both mount the inherently resource intensive investigation necessary to do this, and then reach the conclusion that the agency's *own standards* do not adequately protect the public.

EPA's deference to facilities that do not result in compliance with NAAQS as a practical matter will preclude any complaints from going forward in areas that are in attainment, since EPA is barred from granting permits that will cause a violation of NAAQS. Under the Clean Air Act, an agency may not grant a permit that would violate NAAQS. [7] This would carve out a huge exemption to Title VI, which is supposed to redress discriminatory impacts that occur *notwithstanding* compliance with other laws.

In light of these considerations, EPA's presumption of no adverse impact where there is compliance with NAAQS is another hurdle for complainants and another tool for EPA to dismiss or reject complaints. The EPA should remove this presumption and accept any sound medical or scientific evidence that would tend to show an adverse effect.

Characterize Populations and Conduct Comparisons for Disparity

There is no clear method for identifying and characterizing an "affected population" for means of comparison to the "general population" to determine whether a disparity exists. It is simply defined as "a population that is determined to bear an adverse impact from the source(s) at issue" (Glossary of Terms), or as "that which suffers the adverse impacts of the stressors from assessed sources" Section VI.B.5.a. Yet it is still unclear how this determination will actually be made.

OCR acknowledges that impacts may not always relate to close proximity and that it intends to use models and census GIS data to facilitate its determination of affected population. By themselves, these tools do not take into account other cultural, economic and social factors that may influence which persons will suffer adverse impacts from a project. Likewise, it is important that the "affected population" be broadly interpreted to include persons who work in an area, eat from area sources, or are otherwise impacted even if they do not live in the area surrounding a facility.

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[5] Office of Enforcement and Compliance Assurance, U.S. Envtl. Protection Agency; *Compliance with Permit Clean Air Act Goals: EPA Concerned About Noncompliance with New Source Review Requirements*, 2 ENFORCEMENT ALERT 1, 1 (Jan. 1999).

[6] John Coequyt et al., Environmental Working Group, *Above The Law: How The Government Lets Major Pol off the Hook* 9 (1999).

[7] 42 U.S.C. §7475(a)(3); 40 C.F.R. §52.21(k).

In addition, sole reliance on U.S. census data and demographics analysis that historically have been faulty is a particular problem, especially with regard to identifying and characterizing affected minority residents and those who do not speak English. EPA itself, in its Guidance for Incorporating Environmental Justice Concerns in EPA's NEPA Compliance Analyses, has raised concerns about use of such data in demographic analysis, noting that "[t]he fact that census data can only be disaggregated to certain prescribed levels (e.g. census tracts, census blocks) suggests that pockets of minority or low-income communities, including those that may be experiencing disproportionately high and adverse effects, may be missed in a traditional census-based analysis."

Making the Adverse Disparate Impact Decision: Statistical Significance

Perhaps one of the most disturbing components of the Guidance concerns the determination of disparity. The Guidance states that a finding of adverse disparate impact is most likely to be found where "significant disparity is clearly evident" but "in some instances results might not be clear." Section VI.6. Given the difficulties of identifying and characterizing the "affected population" and conducting a reliable assessment of disparity, a finding of "significance" will depend on the facts and circumstances of each complaint, but is open to wide discretion by OCR. This is exacerbated by the problem of statistical interpretation, for which there simply is no clear guidance. If EPA intended to elucidate this section of the Guidance, it clearly failed to do so. Further, it has erected an unreasonably stringent and unjustified standard that will pose a barrier to complainants when there is evidence of adverse disparate impacts.

To determine whether a disparity is "significant," OCR expects to review several possible measures. While the Guidance states that OCR intends to apply "some basic rules" in its assessment, these "rules" are not clearly defined. The statistical evaluation is particularly troubling. OCR states that "measures of demographic disparity between an affected population and a comparison population would normally be statistically evaluated to determine whether the differences achieved *statistical significance to at least 2 to 3 standard deviations*." Section VI.6. (emphasis added). This is a rather arbitrary and vague rule, the application of which may or may not result in any practical significance. The Guidance does not explain how it selected this "rule" nor does it justify the use of a 2 or 3 standard deviations as a measure of significance to show disparity. Certainly, there can be evidence of disparate impacts that do not meet this standard. By requiring a level of certainty beyond that which is generally required in science or law, OCR has posed an unreasonable barrier to complainants.

There are several important flaws with the rule established by the Guidance. First, it can not be applied abstractly; there is a question as to what will be measured. OCR expects to use one or more measures listed in Section VI.5. But it is unclear which ones will be utilized, or how they will be selected. The results, of course, will vary greatly depending on which measures are used. The guidelines are so vague that they are open to wide disparities in application and interpretation. It also is not clear that each case will fit into this proposed framework. For example, there may be no easily identified standard error in a measure of discrepancy, and thus no way to determine the standard deviation.

Second, as stated above, the distinction of "at least 2 to 3 standard deviations" is an arbitrary one. It is not clear in the abstract whether the percentage to be used will be reasonable for statistical purposes. The "statistical significance" might not have what statisticians refer to as "practical significance," or relevance when applied to real-life situations. The "significance" will depend heavily on how much data is available, rather than on the size of the potential discrepancy. For example, where there is scant data, a certain percentage might seem statistically insignificant, but it is actually significant due to the small amount of data available. Further, it appears that there is a presumption that there is no deviation unless it is proven to 2-3 standards.

In addition, this statistical analysis will not be effective when dealing with *risks* as opposed to strict health standards. Due to the acknowledged difficulty of proving causal links and EPA's reliance on risk data, this analysis can easily result in flawed findings.

Finally, and perhaps most importantly, this arbitrary and vague yet stringent "standard" for assessing the significance of the disparity presents a huge burden for complainants to overcome. This is true not only with regard to the data that will be required, but also due to the lack of technical support available to complainants. Clearly, only a statistician could assess whether the demographic disparity achieved "statistical significance to at least 2 to 3 standard deviations."

Where there is evidence of adverse impact, OCR should err on the side of safety and protection of complainants regarding statistical deviations, rather than requiring more stringent measures. This tough burden will result in OCR's dismissal of the complaint due to lack of "significantly" conclusive evidence, where there is in fact evidence that a disparity exists. EPA should rework this section and clearly identify more specific, workable guidelines that will not result in the dismissal of a complaint except in the most extreme cases.

Justification

Title VI clearly prohibits discriminatory effects. Nonetheless, the Guidance allows a recipient to use economic justification to continue activities that have adverse disparate impacts. While under the Guidance benefits to the community will be considered, in reality, most economic benefits from industrial facilities are realized outside the burdened community. The Guidance provides that OCR will consider the "views of the affected community" in determining whether the facility will provide direct, economic benefits to the community. But there are fundamental problems with this approach.

When EPA seeks to obtain input about benefits to the community, whose voice will count? Communities are often divided by proposals for environmentally harmful facilities that may generate new jobs. How will EPA decide who are the legitimate representatives of the community? Consider, for example, the power plant proposed for the Bayview Hunters Point community in 1994, discussed above. When state officials approved the plant, they accepted a community benefits package proposed by the developer as an important part of mitigation for the project. This benefits package was negotiated with only a small section of the Hunters Point community, and bitterly opposed by many other residents.

What if, as has so often happened in the past, the promise of economic benefits for *local* residents does not materialize? Are the disproportionate impacts still "justified"? What if the environmental impacts of the project are worse than projected? Consider, again, the Bayview Hunters Point neighborhood. When the City of San Francisco built a major sewage treatment plant in the area, it justified the burdens imposed on residents in part by constructing a community education center. But for decades following, the treatment facility has experienced sewage overflows, released noxious odors, and created a long-term community nuisance.

Why should community residents be forced to choose between jobs or their health and other adverse impacts? How can residents who may be desperate for employment make a voluntary choice about whether to expose themselves to disproportionate environmental harms? Why should economic benefits be able to justify burdens on health, particularly when they are distributed in an uneven manner? All permitting actions have some economic benefit that can be used to justify almost anything. There should be no economic justification for racism.

The Guidance provides that a justification may be rebutted if EPA determines that a less discriminatory alternative exists, including mitigation measures. OCR will consider "cost and technical feasibility" in assessing the practicability of potential alternatives. Section VII.A.2. As Professor Bradford Mank has pointed out, since minority groups often live in areas with significantly lower land prices, allowing recipients and developers to use lower land costs as a justification for rejecting an alternative may place many minorities at risk. Bradford Mank, *Environmental Justice and Title VI: Making Recipient Agencies Justify Their Siting Decisions,* 73 TUL. L. REV. 787 (1999). At the least, therefore, EPA should not allow cost to be a factor unless there are extraordinary cost differentials involved.

Finally, if a mitigation measure is approved as a less discriminatory alternative, the Guidance provides for no real monitoring or enforcement methods to guarantee that the measure(s) will actually be implemented or accomplish the necessary reductions. While EPA may threaten to condition future funding on compliance, it will not likely investigate unless the complainants monitor results, which typically they are ill-equipped to do. More importantly, there is no guarantee that reductions will result in the relief required. Reductions can still result in continued discrimination.

Conclusion

There are many serious defects in the proposed Guidance that will drastically limit Title VI's usefulness for communities already overwhelmed by environmental hazards. We urge EPA to redraft the Guidance to address the concerns raised in these comments.

We appreciate the opportunity to submit these comments, and look forward to EPA's response.

Sincerely,

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